

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ALVIN GEORGE WALKER,)
Petitioner,) CASE NO. C09-1858-RAJ
v.)
MARION FEATHER,) REPORT AND RECOMMENDATION
Respondent.)

Petitioner Alvin George Walker, proceeding *pro se* and *in forma pauperis*, brings this S.C. § 2241 petition for writ of habeas corpus. (Dkt. 1.) Mr. Walker contends that he be credited with a one-year discretionary reduction in his sentence because, during a us period of incarceration, he was a participant in a successful challenge to the Bureau of s' (BOP's) regulations implementing 18 U.S.C. § 3621(e). *See Arrington v. Daniels*, 3d 1106 (9th Cir. 2008). The Court recommends denying Mr. Walker's § 2241 habeas n without prejudice for failure to exhaust administrative remedies.

BACKGROUND

Mr. Walker was arrested in September 2004 based upon an arrest warrant in April 2004
charging him as a felon in possession of a firearm. *United States v. Walker*, CR04-441-RSM-1 (W.D.

01 Wash., filed Apr. 30, 2004). At that time, he was released on bond, but that bond was revoked
 02 based on his possession and use of cocaine in November 2004. Dkts. 14, 16, *United States v.*
 03 *Walker*, CR04-441-RSM-1 (W.D. Wash.). Mr. Walker then pleaded guilty to being a felon in
 04 possession of a firearm and was sentenced to thirty-seven months of imprisonment, which was
 05 fourteen months below the relevant sentencing-guidelines range, and three years of supervised
 06 release. Dkt. 25, *United States v. Walker*, CR04-441-RSM-1 (W.D. Wash., dated Feb. 4,
 07 2005).

08 In August 2005, while serving his term of imprisonment in Sheridan, Oregon, Mr.
 09 Walker brought a § 2241 habeas petition in the District of Oregon that challenged the BOP
 10 regulation implementing 18 U.S.C. § 3621(e)(2)(B). See *Walker v. Daniels*, C05-1348-HA
 11 (D. Or., filed Aug. 30, 2005). Section 3621(e)(2)(B) provides that “[t]he period a prisoner
 12 convicted of a nonviolent offense remains in custody after successfully completing a treatment
 13 program may be reduced by the Bureau of Prisons” by up to one year. 18 U.S.C.
 14 § 3621(e)(2)(B). The challenged BOP regulation categorically denied eligibility for early
 15 release for all defendants convicted of being felons in possession of a firearm. The district
 16 court consolidated for briefing the many cases that raised the same claim.

17 Although the District of Oregon denied the writ for habeas corpus, this decision was
 18 reversed by the United States Court of Appeals for the Ninth Circuit in *Arrington v. Daniels*,
 19 516 F.3d 1106 (9th Cir. 2008). The Ninth Circuit held that the BOP violated the
 20 Administrative Procedures Act (“APA”) when it promulgated the regulation for the categorical
 21 exclusion from eligibility for early release under 18 U.S.C. § 3621(e)(2)(B) those prisoners
 22 whose current offense involved the carrying, possession, or use of a firearm. *Arrington*, 516

01 F.3d at 1116. Thereafter, in October 2008, the District of Oregon ordered the BOP to reduce
 02 Mr. Walker's sentence under 18 U.S.C. § 3621(e)(2)(B) "upon successful completion of the
 03 residential substance abuse treatment program." Dkt. 37, *Walker v. Daniels*, C05-1348-HA
 04 (D. Or., dated Oct. 1, 2008). Mr. Walker had, however, already been released from
 05 community confinement on June 15, 2007. (Dkt. 9, Exh. 1 (hereinafter "Ogden Decl."), at 2–3
 06 (noting that during his last six months in custody Mr. Walker had been placed in Pioneer
 07 Fellowship House, then transferred to home confinement, then returned to Pioneer because he
 08 tested positive for alcohol consumption.) Although the BOP's regulation had categorically
 09 excluded him from eligibility for early release, Mr. Walker had not been precluded from
 10 participating in a residential drug treatment program. While *Arrington* was pending before the
 11 Ninth Circuit, Mr. Walker completed the drug-treatment program and was released on the very
 12 same day. (Ogden Decl., at 3; Ogden Decl., Att. A.) Thus, had *Arrington* been issued
 13 earlier, Mr. Walker still would not have been eligible for early release until his completion of
 14 the drug-treatment program on June 15, 2007.¹

15 In November 2007, Mr. Walker tested positive for marijuana. Dkt. 29, *United States v.*
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17 1 The Ninth Circuit noted that a number of petitioners, like Mr. Walker, had scheduled
 18 release dates prior to the issuance of the opinion: "For these individuals, relief may still be
 19 available in the form of modification, amendment, or termination of their supervised release." *Arrington*, 516 F.3d at 1111. The record contains no indication that Mr. Walker ever sought
 20 modification, amendment, or termination of his supervised release either before the District of
 21 Oregon or the Western District of Washington. *Walker v. Daniels*, C05-1348-HA (D. Or.,
 22 filed Aug. 30, 2005); *United States v. Walker*, CR04-441-RSM-1 (W.D. Wash., filed Apr. 30,
 2004). When he returned for his revocation hearing in August 2009, Mr. Walker also never
 suggested that he should be afforded a discretionary sentence-reduction based on his prior
 participation in a drug-treatment program. (Dkt. 9, Exh. 2 (Verbatim Report of Proceedings
 Before the Honorable Ricardo S. Martinez, dated Aug. 7, 2009 (hereinafter "Report of
 Proceedings").)

01 Walker, C04-441-RSM (W.D. Wash., dated Nov. 13, 2007). Because this constituted the first
02 time Mr. Walker had tested positive for a substance since being released in June 2007, the
03 probation officer recommended that no action be taken by the court. *Id.* at 2. In April 2009,
04 however, a warrant was issued for Mr. Walker's arrest based upon his commission of
05 first-degree theft, failure to submit truthful and complete reports, and the aforementioned
06 marijuana use.

07 Mr. Walker is now serving a sentence of twenty-one months after he was arrested in
08 July 2009 and his term of supervised release was revoked in August 2009. Dkts. 30, 32, 37,
09 *United States v. Walker*, CR04-441-RSM-1 (W.D. Wash., filed Apr. 30, 2004). Mr. Walker
10 admitted to three violations of his supervised release: first-degree theft in November 2008,
11 failure to submit complete and truthful reports to his probation officer from March to November
12 2008, and using marijuana in November 2007. (Report of Proceedings, at 2.) Mr. Walker
13 filed his *pro se* § 2241 habeas petition on December 31, 2009, and respondent filed a return in
14 February 2010. (Dkts. 1, 9.) This Court is the proper venue for this action because Mr.
15 Walker is currently confined in the Western District of Washington.

DISCUSSION

17 Although Mr. Walker completed a drug-treatment program and was released in 2007, he
18 contends that he should be afforded a one-year discretionary sentence reduction under 18
19 U.S.C. § 3621(e)(2)(B) after the revocation of his supervised release in 2009 based upon the
20 Ninth Circuit decision in *Arrington*. Respondent argues that this matter should be dismissed
21 because Mr. Walker failed to exhaust administrative remedies prior to bringing this habeas
22 petition, or that his petition should be denied because it lacks merit. The Court recommends

01 dismissal of Mr. Walker's petition without prejudice for failure to exhaust administrative
02 remedies. The Court therefore declines to reach the merits of his habeas petition.

03 Mr. Walker properly brought this matter as a § 2241 habeas petition that challenges the
04 manner and conditions of the execution of his sentence. *See Hernandez v. Campbell*, 204 F.3d
05 861, 864 (9th Cir. 2000). Nevertheless, before petitioning for habeas relief, federal prisoners
06 are required to exhaust their administrative remedies through the BOP. *Fraley v. U.S. Bureau*
07 *of Prisons*, 1 F.3d 924, 925 (9th Cir. 1993); *Tucker v. Carlson*, 925 F.2d 330, 332 (9th Cir.
08 1991); *Martinez v. Roberts*, 804 F.2d 570, 571 (9th Cir. 1986). A federal prisoner need not
09 exhaust administrative remedies if pursuing those remedies would be futile. *Fraley*, 1 F.3d at
10 925.

11 The Court finds that Mr. Walker has failed to exhaust his administrative remedies
12 through the BOP. Mr. Walker filed no requests for an administrative remedy during this or
13 any of his incarcerations with the BOP. (Ogden Decl., at 4; Ogden Decl., Att. F.) Respondent
14 asserts that there are no BOP regulations or policy statements that speak to the issue that Mr.
15 Walker raises—whether the BOP may exercise its discretion to reduce the sentence for a
16 prisoner who completed a drug-treatment program in the past, was released, reoffended, and
17 was returned to custody. (Dkt. 9, at 6.) The Court thus cannot declare with any degree of
18 certainty that it would be futile for Mr. Walker to pursue a remedy through the BOP. Given
19 such circumstances, the Court finds that the BOP should be afforded the first opportunity to
20 address Mr. Walker's novel argument.

21 **CONCLUSION**

22 The Court recommends denying Mr. Walker's 28 U.S.C. § 2241 petition for writ of

01 habeas corpus without prejudice for failure to exhaust administrative remedies. A proposed
02 order is attached.

03 DATED this 15th day of April, 2010.

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Mary Alice Theiler
United States Magistrate Judge

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